

FCC MAIL ROOM

Before the
Federal Communications Commission
Washington, D.C. 20554

2001 JAN -9 A 10: 52

In the Matter of)

AVR, L.P. d/b/a)

Hyperion of Tennessee, L.P.)

Petition for Preemption of)

Tennessee Code Annotated)

Section 65-4-201(d) and Tennessee)

Regulatory Authority Decision)

Denying Hyperion's Application)

Requesting Authority to)

Provide Service in Tennessee)

Rural LEC Service Areas)

RECEIVED
CC Docket No. 98-92**MEMORANDUM OPINION AND ORDER****Adopted: January 3, 2001****Released: January 8, 2001**

By the Commission:

I. INTRODUCTION

1. On June 28, 1999, the Tennessee Regulatory Authority (Tennessee Authority) and TDS Telecommunications Corporation (TDS Telecom) filed petitions for reconsideration of the *Hyperion Preemption Order*.¹ In that Order, the Commission granted in part a petition for preemption filed by AVR, L.P. d/b/a Hyperion of Tennessee, L.P. (Hyperion) in May 1998. In this order we deny those petitions for reconsideration along with a related motion filed by the Tennessee Authority for a stay of enforcement of the *Hyperion Preemption Order*.

¹ AVR, L.P., d/b/a Hyperion of Tennessee, L.P., Petition for Preemption of Tennessee Code Annotated Section 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas, Memorandum Opinion and Order, CC Docket No. 98-92, 14 FCC Rcd 11064 (1999) (*Hyperion Preemption Order*).

II. DISCUSSION

2. Hyperion originally sought preemption of Tennessee Code section 65-4-201(d), which barred the entry of competitive carriers into the service areas of incumbent local exchange carriers in Tennessee that serve fewer than 100,000 access lines. In addition, Hyperion asked that this Commission preempt enforcement of an April 1998 order of the Tennessee Authority to the extent that it denied Hyperion's application to provide service in the service area of the Tennessee Telephone Company.² The Tennessee Authority and TDS Telecom now seek reconsideration of the Commission's determination that the Tennessee Authority's *Denial Order* and Tennessee Code section 65-4-201(d) do not fall within the protection of section 253(b) of the Communications Act of 1934, as amended.³ In addition, on July 9, 1999, the Tennessee Authority filed a motion for stay of enforcement of our *Hyperion Preemption Order* until appropriate universal service mechanisms are implemented by the Commission and the Tennessee Regulatory Authority.⁴ Hyperion filed an opposition to the Tennessee Regulatory Authority's motion for stay of enforcement, dated July 20, 1999, arguing that the Tennessee Regulatory Authority failed to establish any of the four conditions necessary to justify a stay of the Commission's Order.⁵

3. We deny TDS's and the Tennessee Authority's petitions for the following reasons. TDS's petition essentially repeats the same arguments it relied upon in the comments and reply comments it filed in opposition to the Hyperion preemption petition. First, TDS argues that, because the incumbent LEC is regulated differently from competitive LECs, the "competitive neutrality" requirement under section 253(b) of the Communications Act is satisfied even if the

² In Re: AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P., Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, Order Denying Hyperion's Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, Docket No. 98-0001 (Tennessee Authority Apr. 9, 1998) (*Denial Order*). The Tennessee Telephone Company is a wholly-owned subsidiary of TDS Telecom.

³ 47 U.S.C. § 253(b). Section 253 was added to the Communications Act of 1934 (Communications Act or Act) by the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* All citations to the 1996 Act in this order are to the 1996 Act as codified in Title 47 of the United States Code. Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. §253(a). Section 253(b) states that "[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. 47 U.S.C. §253(b).

⁴ Tennessee Regulatory Authority Motion for Stay at 1.

⁵ The Commission applies a four-part test in consideration of motions for stay. See *Virginia Petroleum Jobbers Ass'n*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). To justify a stay, the Tennessee Regulatory Authority must demonstrate (1) a likelihood of success on the merits, (2) irreparable harm in the absence of a stay, (3) the absence of any substantial harm to other interested parties if the stay is granted, and (4) that public interest favors the stay.

incumbent has special protections as long as all competitive carriers are treated alike.⁶ In a related argument, TDS argues that competitive imbalances will result from preemption of the statute.⁷ The Commission rejected these arguments in the *Hyperion Preemption Order*.

4. TDS also argues that, because the *Hyperion Preemption Order* did not allow the Tennessee Authority to implement section 65-4-201(d) "to the extent permissible by law," the Commission's blanket preemption of section 65-4-201(d) was needlessly broad.⁸ The Commission previously considered and rejected this argument, concluding that the Tennessee Authority's own interpretation of Tennessee Code section 65-4-201(d), which the Commission regards as dispositive, made section 65-4-201(d) inconsistent with federal law in every circumstance.⁹ TDS has failed to identify any redeemable portion of the preempted law.¹⁰ Accordingly, we conclude that the Commission's preemption was in fact limited to the extent necessary to correct the violation of federal law in accordance with section 253(d) of the Communications Act. TDS's petition fails to raise new arguments or facts that would warrant reconsideration of that order.

5. The Tennessee Authority also repeats in its petition for reconsideration the arguments it made regarding the Hyperion preemption petition. Those arguments include: (1) that preemption of Tennessee Code section 65-4-201(d) is not competitively neutral to Tennessee rural incumbent carriers because these carriers have obligations under state and federal laws that are not imposed on new entrants;¹¹ (2) that Tennessee Code section 65-4-201(d) is necessary to

⁶ TDS Petition for Reconsideration at 5-6, 10. TDS made this argument in its comments at 5-7 and its reply comments at 2. The Commission rejected the argument in the *Hyperion Preemption Order*, 14 FCC Rcd at 11071-72, ¶¶ 15-16.

⁷ TDS Petition for Reconsideration at 6-8. TDS made this argument in its comments at 8-11 and its reply comments at 3-4. The Commission rejected the argument in the *Hyperion Preemption Order*, 14 FCC Rcd at 11072, ¶ 17.

⁸ TDS Petition for Reconsideration at 12. TDS appears to be referring to section 253(d) of the Communications Act instead of section 253(b). TDS made this argument in its comments at 15-18.

⁹ *Hyperion Preemption Order*, 14 FCC Rcd 11075, ¶ 22.

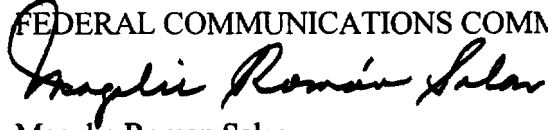
¹⁰ We note that the scope of section 65-4-201(d) is extremely limited and that its preemption does not impinge on any of the Tennessee Authority's general safeguards. Tenn. Code. Ann. 65-4-201(d) states, in its entirety: "Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on the June 6, 1995."

¹¹ Tennessee Authority Petition for Reconsideration at 4 - 7. The Tennessee Authority made this same argument in its comments regarding the Hyperion Preemption Petition. Comments in Response to Hyperion Petition for Preemption, filed July 13, 1998, at 6, ¶ 8. The Commission previously considered and rejected this argument in the *Hyperion Preemption Order*, stating that "[n]either the language of section 253(b) nor its legislative history suggests that the requirement of competitive neutrality applies only to one portion of a local exchange market - new entrants - and not to the market as a whole, including the incumbent LEC." *Hyperion Preemption Order*, 14 FCC Rcd at 11071-72, ¶ 16, citing *Silver Star Reconsideration Order*, 13 FCC Rcd 16359 (1998). The United States Court of (continued....)

preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers within the state of Tennessee;¹² and (3) that the Commission did not fully consider the unity of purpose behind the 1996 Act and Tennessee Code section 65-4-201(d).¹³ That both the 1996 Act and section 65-4-201(d) address similar concerns about the effect of competitive entry on rural incumbent carriers does not insulate the Tennessee statute from section 253 preemption. Instead, Congress appears to have entirely occupied the field of regulating rural competitive entry when it addressed the issue comprehensively in sections 251(f) and 153(37).¹⁴ Just as TDS Telecom and the Tennessee Authority raise no new arguments or facts that warrant reconsideration of the *Hyperion Preemption Order*, the Tennessee Authority raises no new arguments or facts that warrant a stay of enforcement.¹⁵

6. Accordingly, IT IS ORDERED, pursuant to section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the petition for reconsideration filed by TDS Telecommunications Corporation and the petition for reconsideration filed by the Tennessee Regulatory Authority, both dated June 28, 1999, ARE DENIED.

7. IT IS FURTHER ORDERED, that the Tennessee Regulatory Authority's motion for stay of enforcement, filed on July 9, 1999, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

(Continued from previous page)

Appeal for the Tenth Circuit recently affirmed the Commission's *Silver Star Reconsideration Order* in *RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000).

¹² Tennessee Authority Petition for Reconsideration at 8-11. The Commission rejected this argument at *Hyperion Preemption Order*, 14 FCC Rcd at 11074, ¶¶ 18, 20.

¹³ Tennessee Authority Petition for Reconsideration at 11-13; *Hyperion Preemption Order*, 14 FCC Rcd at 11074, ¶¶ 18, 20.

¹⁴ See 47 U.S.C. § 153(37); 47 U.S.C. § 251(f). See also 47 U.S.C. § 253(f).

¹⁵ The Tennessee Authority recognizes that a party seeking a stay must demonstrate, among other criteria, that it is likely to prevail on the merits. Tennessee Authority Motion at 1. Therefore, in as much as we decide against the Tennessee Authority on the merits, the Tennessee Authority's motion for a stay of enforcement is denied.